IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2979 OF 2005

IN

ARBITRATION PETITION NO.371 OF 2004

Shanmugaraja Spinning Mills Pvt.Ltd. ... Petitioner.

vs.

1. M/s.Prestige International and another. .... Respondents.

Mr.Milind Vasudeo i/b. Mr.Y.P.Yagnik, for Petitioner.

Mr.Tushar Bhavsar i/b. A.V.Jain & Associates, for Respondent no.1.

CORAM: D.K.DESHMUKH,J.

DATED: 9th January, 2006

P.C.:-

1. This is a notice of motion taken out by the petitioner for restoration of Arbitration Petition no.371 of 2004 which was dismissed for default by order dated 5th September,2005. The said Arbitration petition no.371 of 2004 was also dismissed for non prosecution on 30.11.2004. That time the matter was on board on 23rd November,2004 and none appeared for the petitioner. The matter was kept back, it was

again called out but again none appeared for the petitioner. Therefore, the matter was adjourned to 30th November,2004. Again on 30th November,2004 none appeared for the petitioner. Therefore, the matter was dismissed for non prosecution. The notice of motion no.1914 of 2005 was taken out. The affidavit in support of that notice of motion was filed by the Advocate on record Mr.Yogesh Yagnik. In his affidavit he has stated that he could not come to the High Court from 22.11.2004 till 2.12.2004 as he was out of station for his personal and social work and therefore, he could not remain present before the Court on 23.11.2004 and 30.11.2004. It is obvious that the Advocate on record was required to go out of station for a long period i.e. from 22.11.2004 till 2.12.2004 but he went out of station without making any alternate arrangement so that matters which are filed by him could be attended when they are listed before the Court. The notice of motion no.1914 of 2004 was disposed of by order dated 2.8.2005. That order reads as under:-

> " It appears that when the matter came up before this Court, on two dates the lawyer did not appear. Thus, the matter came to be dismissed for non-prosecution. The lawyer has filed an affidavit tendering apology and assured the Court that it will not happen again. In this view of the matter

therefore, notice of motion is granted in terms of prayer clause (a). The petitioner however, is directed to pay the cost of this Notice of Motion to Respondent no.1. The cost is quantified at Rs.3000/-."

There is some controversy between the parties that whether this amount of Rs.3000/- was offered by the petitioner to the respondent no.1 or not. But it appears that the amount of cost was offered by the petitioner but the respondent no.1 did not accept it.

2. The Arbitration Petition which was now restored because of the order dated 2nd August,2005 was listed before the Court on 5th September,2005. On that date the matter was called out twice. None appeared for the petitioner. Therefore, the matter was kept back. It was again called out. Again none appeared for the petitioner. Therefore, the matter was dismissed for default. The present notice of motion no. 2979 of 2005 has been taken out for setting aside the order dated 5th September,2005. This time, the affidavit in support of notice of motion is filed not by Advocate on record Mr.Yogesh Yagnik but by Mr.Himanshu Kode, Advocate. It appears that Mr.H.Kode is a Counsel engaged to appear in the matter. Mr.H.Kode in his affidavit has stated that he could not appear before this Court on 5.9.2005 on both the

occasions because he was arguing a matter in some other Court. What is pertinent to note here is that though Mr.Yagnik continued to be the Advocate on record neither in the affidavit filed in support of the notice of motion there is any explanation to be found why Mr.Yogesh Yagnik remained absent before the Court on 5.9.2005 on both the occasions when the matter was called out, though Mr.Yogesh Yagnik had promised the Court that this will not happen again. What is further pertinent to note here is that in the affidavit filed in support of this notice of motion Mr.H.Kode Advocate has not bothered to disclose in this affidavit that this petition was dismissed for default on the earlier occasion and in what circumstance for what reasons the restoration order was made. The fact that on the earlier occasion the petition was dismissed for default and then it was restored, was totally suppressed in the affidavit filed in support of this notice of motion. The respondent no.1 has filed affidavit in reply to this notice of motion and has pointed out that this petition was dismissed earlier and it was restored on the Advocate on record tendering the apology. In paragraph no.8 of the affidavit the respondent no.1 has stated that the petitioner is represented by Mr.Yagnik Advocate who has filed his vakalatnama. It was pointed out that when the petition was dismissed on the earlier occasion Mr.Yagnik Advocate had filed the affidavit tendering apology and has given assurance to the Court that he will be careful in future. It was stated that Mr.Kode, Advocate had filed

affidavit but neither Mr.Kode Advocate has disclosed in the affidavit why Mr.Yogesh Yagnik did not remain present nor Mr.Yogesh Yagnik Advocate has given any explanation as to why he did not remain present in the Court. On behalf of the petitioner neither the petitioner nor Mr.Kode Advocate nor Mr.Yagnik Advocate have bothered to file any further affidavit. In view of the documents and affidavits on record, it is clear that the matter came to be dismissed because the Lawyers engaged by the petitioner were careless in attending the Court and as the petition came to be dismissed for the mistake of the lawyers obviously, the petitioner cannot be penalised. Therefore, it would be in the interest of justice to restore the petition. However, as the interest of the respondent no.1 will definitely be prejudiced because of the restoration of the petition which was already dismissed, the prejudice caused to the interest of the respondent no.1 will have to be mitigated by awarding cost of this notice of motion. The notice of motion is therefore, granted in terms of prayer clause (a) subject to the condition that within a period of two weeks from today, the petitioner pays to the respondent no.1 as and by way of cost of this notice of motion Rs.10,000/- together with the amount of Rs.3000/- which was the cost awarded by order passed in notice of motion no.1914 of 2005.